

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.495 of 2013

Arising Out of PS.Case No. -47 Year- 2011 Thana -KATIHAR GRP CASE District- KATIHAR

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1. Shahmad Ansari Son Of Late Hadish Ansari Resident Of Village - Jeepur, P.S.-
Dhansoi, District - Buxar

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : M/S. Surendra Kumar Singh, Avinash Shekhar &
Tulika Singh

For the Respondent/s : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 08-10-2015

This appeal is directed against the judgment of conviction and sentence dated 13/05/2013/21.05.2013 passed by Sri Bateshwar Nath Pandey, Special Judge under the N.D.P.S. Act, Katihar in G.R. Case No. 94 of 2011 arising out of Katihar Rail P.S. Case no. 47 of 2011 by which he has convicted the appellant under section 20(b)(2)(c) of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as the N.D.P.S. Act) and has sentenced him to undergo rigorous imprisonment for ten years and also to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo further rigorous imprisonment for one year.

2. Prosecution case, as alleged in the F.I.R. on the self statement of Sanjay Kumar Prasad, P.W. 4, alleging therein that on 14.09.2011 at about 21.30 hours he got an information from the railway security control room, Katihar that in train no. 12505, North East Express, R.P.F. Escort Party has caught a person along with two bags of Ganja. On getting information, the informant informed the G.R.P. police, Katihar and Assistant Security



Commissioner, R.P.F. Katihar with a request to attend the train. Further case is that on receipt of the said information, the informant along with Assistant Deputy Inspector, G.R.P. Sri Mithilesh Bhatt (P.W. 8), Assistant Security Commissioner, R.P.F. Katihar Md. Nayeem (P.W. 6), Assistant Deputy Inspector R.P.F. Ajai Kumar Mauar (P.W. 5) with the arm force were present at platform no. 5 at Katihar railway station to attend the train. The train reached the platform at about 21.58 hours when they attended the said bogie and from the said train the Escort party Incharge Kriti Kumar Sanyal (P.W. 1) along with party got down with a person along with two bags from bogie no. NF 10406 on platform no. 5. It is further stated that on search of two bags two packets, one from each bag, Ganja wrapped in plastic recovered and on inquiry about Ganja the person disclosed that both bags belong to him and disclosed his name as Shahmad Ansari and produced his ticket bearing no. 61015165 from New Kooch Bihar to Buxar. Both the seized bags were given by Mithilesh Kumar Bhatt (P.W. 8) to the Assistant Security Commissioner, R.P.F. Katihar and seizure list was prepared and articles were seized. It was further alleged that both the bags contained Ganja wrapped in plastic each weigh in all about 28 kg.

3. On the self statement of the informant F.I.R. was lodged and investigation started. During investigation, witnesses supported the prosecution case regarding search and seizure of Ganja and thereafter the I.O. took sample from the seized Ganja and was sent to the Forensic Science Laboratory (hereinafter referred to as the F.S.L.) for examination and a charge-sheet was submitted, Cognizance was taken and subsequently charge was framed.

4. During trial nine witnesses were examined by the prosecution. They are P.W. 1 Kriti Kumar Sanyal, P.W. 2 Harendra Nath Boro, P.W. Bishwajit Pal. All the P.Ws. 1, 2 and 3 are members of the Escort Party P.W. 4 Sanjay Kumar Prasad, Assistant Security Commissioner Inspector G.R.P.

post Katihar East, P.W. 5 is A.S.I. Ajay Kumar Mauar, P.W. 6 is Assistant Security Commissioner Md. Naim, who were the persons who apprehended and before whom search was made and seizure list prepared before the independent witnesses. P.W. 8 is A.S.I. Mithilesh Bhatt, who is also a member of the party of the informant who attended the train at Katihar on platform no. 5 on information by the Escort Party and P.W. 9 is the I.O. and P.W. 7 is the second I.O.

5. However, P.Ws. 1, 2 and 3 supported the prosecution case that he found the appellant in the bogie of North East Express and was found in possession of two bags containing Ganja and they informed the authorities on which the party constituting the informant P.W. 4 along with P.Ws. 5,6 and 8 attended the train and the victim was apprehended along with two bags which contained the alleged Ganja and the seizure list was prepared and the article was seized. P.Ws. 7 and 9 are the I.O. of the case who conducted investigation and sent sample of the seized article to the F.S.L. for chemical analysis.

6. The documentary evidence adduced is Ext. 1 the seizure list prepared by Mithilesh Bhatt, Ext. 2 is the written petition, Ext. 2/1 is the endorsement on written petition, Ext. 3 is signature of S. K. Prasad on seizure list, Ext. 3/1 is the signature of Md. Nayeem identified by S. K. Prasad, Ext. 3/2 is the signature of Ajay Kumar Mouar on the seizure list, Ext. 4 is the signature of Mithilesh Bhatt on the seizure list, Ext. 5 is the signature on Memo of arrest by Kamruddin and Ext. 6 is the F.S.L. report.

7. The trial court after taking into consideration evidence both oral and documentary and of the witnesses convicted the appellant and sentenced him as mentioned above.

8. Learned counsel for the appellant has challenged the order of conviction and sentence recorded by the trial court. Learned counsel for the appellant, however, has contended that though there is evidence that the



petitioner was found in possession of two bags and it is alleged that the said bags contained Ganja and he was apprehended at Katihar railway station along with two bags. However, though the seizure list prepared with regard to the seizure of two bags allegedly contained Ganja but it has been contended that there is no evidence that whether the two bags seized were sealed. It has further been contended that there is no evidence where the two bags were kept from the date of occurrence i.e. 14.09.2011 till the date the sample was sent to the F.S.L. i.e. 24.10.2011. It has further been contended that the said seized Ganja was never produced before the Magistrate as per the requirement of section 52-A of the N.D.P.S. Act. It has further been submitted that there is neither compliance of section 55 nor of section 57 of the N.D.P.S. Act. It has further been contended that Ganja seized has not been produced in Court nor there is any report of destruction nor the same was produced before any Magistrate to take representative sample from the said seized Ganja. It has further been contended that to the contrary Ganja was said to have been taken from the seized articles and produced before the police in cotton bags and subsequently it was placed but the sample was not taken either before the court nor before the Magistrate, nor there is any evidence that the said sample taken has got the seal of the Officer-in-charge of the police station neither there is any evidence of the seal in Malkhana nor the Malkhana register has been produced and, hence, contended that the F.S.L. report on the said sample is neither reliable nor is worthy of confidence to record the judgment of conviction and sentence and, hence, required to be rejected.

9. Learned counsel for the State, however, contended that Ganja was kept under the Escort with the Escort party as well as G.RP. & R.P.F. and the report of the F.S.L. shows that the said seized article was Ganja.

10. However, taking into consideration the respective



submissions and going into the evidence in the light of the submissions, it is apparent that nine witnesses have been examined in this case. The evidence of P.Ws. 1, 2 and 3 are only to the effect that while in duty in the North East Express as the member of the Escort party, caught hold a person having Ganja in two bags and then they handed over the said persons to G.R.P. Katihar and thereafter they informed their superior Officers and they have identified the accused in court. They have further stated that they also gave information in this regard with regard to the finding of Ganja in two bags and the persons having admitted that the bags belong to the petitioner and then information was given to the control room. He has further stated that on information the superior Officers were present at Katihar railway station before whom seizure of Ganja was made.

11. P.Ws. 4,5, 6 and 8 are the Officers at Katihar railway station before whom appellant was apprehended and search of the bags was made, seizure list prepared and the case was lodged on the written report of P.W. 4 which has been marked as Annexure-2 and has supported that on receipt of information about the finding of Ganja attended Katihar railway station along with P.Ws. 5,6 and 8 and they apprehended and two bags of Ganja were seized. Seizure list prepared. However, from the evidence of these witnesses P.Ws. 1,2 , 3, 4,5,6 and 8 it is apparent that two bags were seized from possession of the appellant and from the two bags one packet Ganja recovered from each bag wrapped in plastic cover which contained 14 Kg. each. Thus it was about 28 Kg. of Ganja which was recovered from possession of the appellant.

12. Though, it has been stated that two bags of Ganja containing 14 kg. each were recovered from possession of the appellant but these witnesses have specifically state that neither Ganja was seized before them nor any representative sample was taken before them and, hence, from the evidence of these witnesses it is apparent that there is no evidence at all where the Ganja



were kept which was seized on 14.09.2011 at Katihar railway station. P.W. 9 is the 1st I.O. However, in the evidence of first I.O. he has stated that he recorded the statement of Kriti Kumar Sanyal, Ajay Kumar Mouar, Ram Pravesh Sah, Mangal Sah, the seizure list witnesses, and Mithilesh Bhatt in which they supported the prosecution case and he has specifically stated that he handed over the investigation to Sri Ramdeo Paswan. However, he has stated that the sample exhibits were sent to the F.S.L. by the S.H.O. and, hence, from the evidence of P.W. 9 it is apparent that there is no evidence where Ganja seized were kept from the date of occurrence i.e. 14.09.2011 till he handed over investigation to P.W. 7 nor there is any evidence that who sent the ganja . However, as per the evidence of P.W. 9 he has stated that he did not send Ganja or sample to the F.S.L. rather his evidence is that sample was sent for examination of the said Ganja to the F.S.L. by the S.H.O.

13. P.W. 7 is the Officer-in-charge of G.R.P. Katihar. He has stated in his evidence that he took charge of investigation from Quamruddin (P.W. 9) and though he has stated that he recorded the statement of witnesses Md. Naim, Harendra Nath Boro, Dilip Kumar Dey, Vishwajit Pal and sent the seized exhibit to F.S.L. by order of the court. However, it is not specifically stated in his examination-in-chief that when he sent the sample. He has not stated that where he kept the seized article. He has not stated whether the article seized was kept with a seal of the seal of local police station. P.W. 7 has stated that after taking investigation he produced the sample of the seized article on 24.10.2011 before the court. However, from the F.S.L. report it appears that the said letter and sample dated 24.10.2011 was received in the office of the F.S.L. on 31.10.2011 through the special messenger C/109 Sheo Nandan Paswan. However, in the evidence of the witnesses there is no mention where the Ganja was kept from the time Ganja was seized till date when Ganja was sent for



examination and there is no mention that from where the sample was taken and neither the seized article was produced nor any Malkhana register proved to show that the Ganja was kept at Malkhana. However, it is relevant to refer section 52-A of the N. D. P. S. Act and sub-section (2) of Section 52-A provides “where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the Officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of ____

(a) certifying the correctness of the inventory so prepared;

or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

14. However when an application under sub-section (2) of Section 52-A of the Act is made, the Magistrate shall, as soon as may be, allow the application.

15. However, from the evidence on record it is apparent that there is non compliance of Section 52-A of the Act as the article seized was neither produced before any Magistrate nor any certification for taking

representative sample of the article seized was given nor any order of destruction passed nor the article seized has been produced in Court and, hence.

16. However, section 55 of the Act provides that an Officer-in-charge of the police station shall take charge of and keep in safe custody, all articles seized under the Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station pending order of the Magistrate. Hence, the article seized is required to be kept under seal of the police station and the sample also so taken. However, neither there is any evidence where the seized article was kept nor there is any evidence that the sample so taken was sealed with the seal of the officer-in-charge of the police station.

17. However, it is true that the provisions of sections 52-A and 57 are not mandatory rather the provisions contained in section 52-A and 57 are directory and the violation of these provisions would not ipso facto vitiate the trial of the appellant. However, the I.O. cannot totally ignore these provisions as the failure will have a bearing on the appreciation of evidence regarding seizure of the article and may question the sample taken.

18. However, having regard to the fact that the article was seized on 14.09.2011 but there is no evidence where the article was kept though the investigation was handed over to P.W. 9. P.W. 9 during his investigation did not mention where the articles were kept. P.W. 9 subsequently handed over the investigation to P.W. 7 and in the evidence of P.W. 7 it was also not mentioned where the articles were kept. There is no evidence that whether the sample was sent from the seized article on 24.10.2011. However, having regard to the fact

that there is no evidence that whether the articles were kept from 14.09.2011 to 24.10.2011 and the sample having not been taken before the Magistrate nor there is evidence that the article seized were sealed with the seal of the Officer-in-charge of the police station and neither the article seized was ever produced before the court nor before a Magistrate nor a destruction certificate has been produced and, hence, the sample produced before the court without producing the seized article under sealed cover caused serious doubt about the sample whether taken from the article seized and this has caused serious prejudice to the appellant.

19. Hence, it is not proper to record an order of conviction on the basis of the report of the said sample sent to the Forensic Science Laboratory and, hence the order of conviction and sentence recorded by the trial court is not sustainable and it is held that the prosecution has not been able to prove charge beyond reasonable doubt. Hence, the order of conviction and sentence passed against the appellant by the trial court is set aside and the appeal allowed. The appellant is jail, is ordered to be released forthwith, if not required in any other case.

(Gopal Prasad, J)

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